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In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; INDIVIDUAL MEMBERS OF THE MICHIGAN CANNERS AND FREEZERS ASSOCIATION, INC.; DUKESHERER FARMS, INC.; and FERRIS PIERSON,

Appellants,

vs.

THE AGRICULTURAL MARKETING AND BARGAINING BOARD and THE MICHIGAN AGRICULTURAL CO-OPERATIVE MARKETING ASSOCIATION, INC.,

Appellees.

On Appeal From The Supreme Court Of Michigan

BRIEF FOR THE AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF FOR THE AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

The American Farm Bureau Federation respectfully submits this brief *amicus curiae* in support of the appellees. Pursuant to Rule 36.2 of the Rules of the U.S. Supreme Court, written consents to file this brief have been obtained from all parties to the case and are filed herewith.

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation ("Farm Bureau") is a voluntary general farm organization which was organized in 1919 and incorporated under the "General Not-For-Profit Corporation Act" of the State of Illinois. The purpose of the Farm Bureau is to promote, protect and represent the business, economic, social and educational interests of farmers and ranchers of the United States. Farm Bureau has member state organizations in 48 states and in Puerto Rico representing more than 3 million member families.

Throughout the entire legislative process, including the introduction and amendments of the Agricultural Fair Practices Act of 1968, the Farm Bureau Federation was actively involved as a supporter of the legislation to the extent that it would strengthen the bargaining power of farmers by preventing handlers, processors and other middlemen from interfering with farmers in the formation and operation of effective marketing and bargaining associations.

Farm Bureau is concerned that its farmer members in the state of Michigan and other states which have enacted or will enact legislation similar to the Michigan Agricultural Marketing and Bargaining Act will be adversely affected if the federal Agricultural Fair Practices Act, which was intended to bolster the bargaining position of farmers, is applied to ironically weaken or eliminate such state laws which are also intended to improve farmer bargaining power supplementary to the federal Act.

As a proponent of free competition and of the ability for farmers to more readily compete in the market place by unifying to improve the terms for the sale or production of agricultural commodities, the Farm Bureau supports the position of the appellees as set forth in this brief.

SUMMARY OF ARGUMENT

The federal Agricultural Fair Practices Act is not a handler's or processor's rights statute which can be properly interpreted to prevent the state of Michigan from extending additional protection to producers and their associations in view of the void left by the federal Act.

The federal Act does not create a right for a producer not to be represented by an association of producers nor for a handler or processor to deal with whom they choose. The sole and limited function of the law is to curb improper coercive activity by handlers against producers so as to impact their decision to join or refrain from joining or otherwise deal with an association.

Compliance with the federal Act and the Michigan Agricultural Marketing and Bargaining Act is not a physical impossibility nor does the state law stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress so as to require invalidation of the state law under the federal preemption doctrine.

ARGUMENT

THE MICHIGAN AGRICULTURAL MARKETING AND BARGAININIG ACT IS NOT PREEMPTED BY THE FEDERAL AGRICULTURAL FAIR PRACTICES ACT UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION.

A. The Purpose Of The Michigan Agricultural Marketing And Bargaining Act And Of The Federal Agricultural Fair Practices Act, To Strengthen The Marketing And Bargaining Position Of Individual Producers, Is The Same, And The Additional Protection Provided By The Michigan Act In Regulating The Bargaining Relationship Is Consistent With Such Purpose.

A resolution of the issue before this Court regarding the compatibility of the Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws §§290.701 to 290.726 and the Agricultural Fair Practices Act, 7 U.S.C. 2301 to 2306, requires a basic understanding of the purposes of both statutes.

In passing the Agricultural Fair Practices Act in 1968, Congress did not intend to promote and protect the economic interests of handlers, processors and other middlemen over the interests of agricultural producers and their associations. To the contrary, it was the economic bargaining power of individual producers and their associations which was threatened and in need of protection.

In the report of the U.S. Department of Agriculture recommending passage of the Act, Secretary of Agriculture Freeman stated:

> Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissension in the organization.
>
> Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.
>
> If this bill were enacted, many producers who fear harassment or discrimination would feel free to join a cooperative association. It would help producers use cooperatives as a more effective tool in marketing their products.[1]

Apart from the conclusions of the Secretary, the hearings before the Subcommittee of the Senate Committee on Agriculture and Forestry relative to the need for the Act contain statements of numerous individuals who attested to the unfair treatment of producers who joined or were desirous of joining an association.[2]

Congress had passed Section 6 of the Clayton Act, 15 U.S.C. 17, in 1914 and the Capper-Volstead Act, 7 U.S.C. 291 to 292, in 1922, to allow the formation of cooperatives (producer associations) as an exception to the anti-trust laws so that such organizations could function to represent

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[1] U.S. Code. Cong. and Admin. News (1968), page 1875.

[2] Hearings on S. 109 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 89th Cong., 2nd Sess. (1966). Hearings on S. 109 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. (1967).

farmers in certain legitimate marketing and bargaining objectives. As explained by Senator Capper, the Capper-Volstead Act was ". . . to give the farmer the same right to bargain collectively that is already enjoyed by corporations."[3]

The ultimate goal under the Agricultural Fair Practices Act in preventing discriminatory conduct by handlers was to give producer associations the opportunity to survive so as to carry out legitimate marketing and bargaining activities for farmers as Congress had previously authorized in 1914 and 1922.

As stated by Secretary Freeman in his testimony before the Senate Subcommittee in support of the Act:

> Because he usually acts individually, the farmer has almost no strength at the bargaining table. It is only when the farmers act in concert that the bargaining process can function as intended in our free enterprise system. It is simply too much to expect a result fair to both parties and in the national interest when one party at the bargaining table is so much stronger than the other. Congress recognized this when it enacted laws governing bargaining between labor and management.
>
> Farmers and their cooperatives are simply asking in S. 109 [the Agricultural Fair Practices Act] that they have the same right to organize and to bargain in the marketplace that is accorded other groups. The act before you will be an important step in that direction.[4]

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[3] 62 Cong. Rec. 2057 (1922).

[4] Hearings on S. 109 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 90th Cong., 1st Sess. (1967), pages 21-22.

While the Fair Practices Act, as finally signed into law, was aimed at strengthening farmer bargaining power, the law, in fact, has had little if any impact on achieving such goal. One author of a compilation of the legislative history of the Act has even described the law as being "watered down" which may be attributed to the tremendous opposition to the law by the processing industry and the disunity among the proponents of the legislation.[5]

The narrow result which Congress achieved "for farmers" in the Act is contained in the prohibited practices section, 7 U.S.C. 2303, which purports to curb coercive acts, threats, intimidation, and other patently improper pressure directed against farmers to prevent them from attaining the benefits which may be achieved through a marketing or bargaining association.

What the Fair Practices Act failed to do was to establish meaningful standards and requirements to regulate the bargaining relationship between producer associations and processors and to regulate the representational relationship between producers and producer associations.

Numerous bills have been unsuccessfully introduced to amend the Fair Practices Act and to serve as independent legislation to "fill in" the void left by the Act.[6]

The Michigan legislature, in response to the need to promote and protect the interests of its farmers, passed

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[5] Torgerson, Randall E., Producer Power at the Bargaining Table, University of Missouri Press, 1970, page 213.

[6] See Hearings on S. 726, S. 727, S. 1775, S. 1972 and S. 2846 Before the Subcommittee of the Senate Committee on Agriculture and Forestry, 92nd Cong., 1st Sess. (1971) and Hearings on H.R. 348, H.R. 7597, H.R. 8886, H.R. 8887 and similar bills Before the Subcommittee of the House Committee on Agriculture, 92nd Cong., 1st Sess. (1971). Also see H.R. 4975, 97th Cong., 1st Sess. (1981).

the Michigan Agricultural Marketing and Bargaining Act, Mich. Comp. Laws §§290.701 to 290.726, in 1972.

To interpret the federal Act to preempt the Michigan Act according to the federal preemption doctrine as recently explicated in *Fidelity Federal Savings and Loan Ass'n., et al.* v. *de la Cuesta*, 458 U.S. 141 (1982), would stand the Fair Practices Act on its head. Such an application of the federal law would clearly turn the Act into a "processor's rights" law which would effectively block the Michigan legislature and other states[7] from regulating the often one-sided bargaining relationship between producer associations and processors.

In its judgment, the Michigan legislature has made it an unfair practice for a handler of agricultural commodities to refuse to bargain with or recognize an accredited association of producers which represents over one-half of the producers who produce over one-half of the commodity in a designated bargaining unit. Mich. Comp. Laws §290.704 (1)(g). Clearly, if a handler refused to bargain under such circumstances, the producer association could be effectively undermined. To further provide effectiveness and order to producer associations, the Act makes an accredited association, described above, the exclusive representative of all producers in a designated unit, regardless of their membership in the association. Mich. Comp. Laws §§290.710 and 290.713. Such a measure is essential to create unity within a bargaining area to provide an ac-

[7] The New York legislature has recently enacted legislation to require good faith bargaining between processors and growers pursuant to a marketing order approved by two-thirds of the growers in the area affected. N.Y. Agric. Mkts. Law §§293-294. (McKinney Supp. 1982).

credited association with the needed bargaining power to command meaningful negotiations with handlers.[8]

The Michigan Act squarely adds additional protection to producers and their associations not afforded by the federal Fair Practices Act. A state should be permitted to go further in protecting its citizens by filling in a void left by a federal statute as long as the state law is not inconsistent with federal law or would not otherwise stand as an obstacle to the accomplishment of Congressional purposes and objectives of federal law. *Goldstein* v. *California*, 412 U.S. 546 (1973), *Credit Data of Arizona, Inc.* v. *State of Arizona*, 602 F. 2d 195 (9th Cir. 1979), *In the Matter of Jama*, 436 F. Supp. 936 at 965, (M.D. Fla. 1977).

As conceded in the Jurisdictional Statement at page 8, the Fair Practices Act has not preempted the field in view of Section 6, 7 U.S.C. 2305, which provides that state law shall not be changed or modified. Since Congress has not expressly preempted state regulation in the federal Act nor in the legislative history, the added protection of the Michigan Act should stand. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).[9]

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[8] The Michigan Act additionally prevents a handler from negotiating directly with a producer, once an association is accredited for the bargaining unit in which the producer is included. Mich. Comp. Laws §290.704(1)(h).

[9] See page 540 in *Rath*, 430 U.S. 519 (1977).

B. By Prohibiting Improper Pressure On A Producer In The Exercise Of His Decision To Join Or Refrain From Joining An Association, The Agricultural Fair Practices Act Does Not Thereby Create An Absolute Right For A Producer Not To Be Represented By An Association.

There is no actual or implicit conflict between the requirement in the Michigan Act that accredited associations shall serve as the exclusive representative of all producers and the requirement in the federal Fair Practices Act that neither processors nor associations of producers may exert *improper pressure* on producers to influence their decision to join or refrain from joining an association.

Since the federal Act did not provide for good faith bargaining and exclusive representation of producers by producer associations, there was no compelling reason for Congress to provide in the same law whether a producer should have a right not to be represented by an association. The concern was purely with harassing tactics that handlers and processors had employed to discourage producer membership and affiliation with associations.

The appellants' argument that the Agricultural Fair Practices Act gives a producer the right not to be represented by an association and that such right is violated by the Michigan Act would require this Court to erroneously rule that "legislative enactment" constitutes improper coercive activity when the federal Act only proscribes coercive activity by handlers.

The only right guaranteed by the Fair Practices Act is the right of a producer to be free from *improper pressure* when a producer makes a decision to associate, not associate, or otherwise contract with an association. As stated in the "Findings and Policy" section of the Senate Report

No. 474 on the Agricultural Fair Practices Act, 90th Cong., 2nd Sess. (1967):

> Farmers have cited the wider use and acceptance of contract marketing and the growing concentration of power in the hands of fewer and larger buyers as reasons for the need for stronger and more effective marketing and bargaining associations of farmers. Producers voluntarily join these marketing associations as a means of uniting to market their commodities.
>
> Many witnesses contended that if the producer is to be given a free choice, he should be protected from *improper pressure* in either direction either to join or not to join an association, and the legislative findings reflect this objective. [Emphasis added].[10]

The operative sections of the federal Act and the Michigan Act clearly serve different functions to accomplish the general purposes of strengthening producer bargaining power and are not in conflict.

C. The Agricultural Fair Practices Act Does Not Create A Right For Handlers Or Processors To Deal With Whom They Choose.

There is no conflict between the requirements in the Michigan Act that a handler must negotiate with an accredited association as the exclusive representative of all producers in a bargaining unit and the disclaimer section of the federal Act which merely clarifies that Act is not intended to *require* a handler to negotiate or deal with an association of producers:

Disclaimer of intention to prohibit normal dealing

> Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor re-

[10] U.S. Code. Cong. and Admin. News (1968), page 1869.

quire a handler to deal with an association of producers. 7 U.S.C. 2304.

Congress's sole purpose in adding such clause was to allay the fears of processors and other purchasers of agricultural products that the prohibited practices section of the federal Act, 7 U.S.C. 2303 (a), (b), (c) and (d), would be erroneously interpreted to require dealing with producer associations.

By passing the prohibited practices section of the Act, 7 U.S.C. 2303 (a), (b), (c) and (d), Congress wanted to prevent processors from any activity, including selecting persons with whom processors would do business, for the purpose of pressuring a producer not to join or contract with an association. Any other business transactions engaged in by a processor which were not for such wrongful purpose were not to be considered as "improper pressure" prohibited by the Act.

The thrust of the disclaimer section is to show Congressional intent that only business transactions tainted with improper motives, as opposed to other "normal" business transactions, were to be prohibited. The section was not intended to create an unqualified right for a handler to deal directly with producers who have joined an association.

As stated in the Senate Report No. 474:

> Section 5 [7 U.S.C. 2303] disclaims any intent to prevent handlers and producers from selecting their customers and suppliers *for any reason other than a producer's membership in an association of producers,* or to prevent handlers and producers from dealing with one another individually on a direct basis, or to require a handler to deal with an association of producers. The bill does not prevent or require these actions and is not intended to do so. While the proponents of the bill stated in their testimony that this was not the purpose, there was some concern, especially on the

> part of processors and other purchasers of agricultural products, that the bill in fact went further than intended. The committee felt that a clear statement in the bill itself would be helpful to courts, handlers, associations, producers, and others in their construction of this legislation; and has recommended inclusion of this section in the bill. [Emphasis added.][11]

The net effect of the Act's disclaimer clause (passed only to explain what the Congress did not do) and the prohibited practices section is one of neutrality towards normal dealings between handlers, producers, and producer associations. Together, the sections do not require or prevent selection of customers or bargaining under normal circumstances. Given the neutrality of the federal law, there can be no conflict with the Michigan Act's bargaining requirement relative to accredited producer associations.

CONCLUSION

For the reasons set forth above, there is no conflict between the federal Agricultural Fair Practices Act and the Michigan Agricultural Marketing and Bargaining Act. Therefore the decision of the Michigan Supreme Court, reported at 416 Mich. 706, 332 N.W. 2d 134 (1982), should be affirmed.

Respectfully submitted,

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[11] *Ibid.*, page 1873.